JUDGE BUCHWALD

08 CV 02004

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDIAN HARBOR INSURANCE COMPANY,

Plaintiff,

v.

2420 PROSPECT AVENUE CORP. and LISA SOSA,

Defendants.

Index No.

Date Filed:

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COMPLAINT

Plaintiff Indian Harbor Insurance Company ("Indian Harbor"), by its attorneys, Nixon Peabody LLP, as and for its Complaint, alleges as follows:

THE NATURE OF THIS ACTION

1. This declaratory judgment and money judgment action arises out of demands that Indian Harbor provide defendant 2420 Prospect Avenue Corp. ("2420 Prospect") insurance coverage for an underlying action entitled *Lisa Sosa v. 2420 Prospect Avenue, Corp.*, Index No. 7319/07, Supreme Court of the State of New York, Bronx County, filed on or about February 5, 2007 (the "*Sosa* action").

2. Indian Harbor has denied coverage to 2420 Prospect, and is providing a courtesy, interim defense to 2420 Prospect in the *Sosa* action, pending resolution of the coverage issues.

3. In this declaratory judgment action, Indian Harbor requests a judicial determination that it has no obligation to provide insurance coverage to anyone in connection with the *Sosa* action on the grounds that, among other things, there has been breach of the conditions precedent to coverage under the Indian Harbor insurance contract, including the failure to provide timely written notice of occurrence, claim and suit, forward documents, and

cooperate with respect to this matter, and that the Exclusion of Injury to Employees and Independent Contractors/Subcontractors apply.

4. Finally, Indian Harbor seeks a money judgment against the defendants for all or some of the defense costs incurred and any indemnity amounts paid by Indian Harbor with respect to the *Sosa* action, plus interest.

JURISDICTION AND VENUE

5. This action is filed under and pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201.

6. Jurisdiction of this Court over this action is invoked pursuant to 28 U.S.C. § 1332(a)(1). The matter in controversy exceeds, exclusive of interest and costs, the sum of Seventy-Five Thousand Dollars ($75,000).

7. There is complete diversity of citizenship between Indian Harbor and the defendants.

8. Venue in this District is proper under 28 U.S.C. §1391(a) (1), (2), (3) and §1391(c).

9. An actual case and controversy of a justiciable nature exists between the parties, involving the rights and obligations of the parties under an insurance contract issued by Indian Harbor.

10. Indian Harbor is, therefore, entitled to bring this action in this Court.

THE PARTIES

11. Indian Harbor is a North Dakota corporation with its principal place of business in Stamford, Connecticut.

12. Upon information and belief, 2420 Prospect is a New York corporation which maintains its principal place of business in Bronx, New York.

13. Upon information and belief, at all relevant times, defendant Lisa Sosa is a New York resident.

THE UNDERLYING *SOSA* ACTION

14. In the underlying *Sosa* action, Ms. Sosa alleges that 2420 Prospect owned, operated, controlled and maintained the buildings located at 2420-2422 Prospect Avenune, Bronx, New York (the "Premises"). She alleges that 2420 Prospect allowed an unsafe condition to exist on the Premises by allowing rodents to nest and breed inside the buildings. Ms. Sosa further alleges that on or about May 4, 2006 she was bitten by a mouse tick while residing in Apartment 3BB, 2422 Prospect Avenue, Bronx, New York pursuant to a lease she entered into with 2420 Prospect. She alleges that this mouse-tick bite resulted in personal injuries, including physical injuries to her body and limbs, emotional, mental and psychological injuries, incapacitation from usual tasks and duties and the need for medicines in the future. Plaintiff seeks reimbursement for past and future medical care.

15. In her second cause of action, Plaintiff alleges that 2420 Prospect breached their lease agreement by failing to rid the Plaintiff's apartment of rodents even after she notified 2420 Prospect of this unsafe condition, thereby failing to maintain the Plaintiff's apartment in a habitable condition.

THE INDIAN HARBOR INSURANCE CONTRACT

16. Indian Harbor issued insurance contract no. WFI3001265 to 2420 Prospect Avenue Corp., 2420 Prospect Avenue, Bronx, NY 10458, with a policy period of November 25, 2005 through November 25, 2006 (the "Indian Harbor insurance contract").

17. The Indian Harbor insurance contract is subject to all of its terms, conditions, provisions and exclusions, which are fully incorporated herein by reference.

18. Indian Harbor seeks and is entitled to a judicial declaration relieving it of any coverage obligation in connection with the underlying *Sosa* action. Indian Harbor is also entitled to an award of all amounts it incurs for defense and any indemnity, plus interest, in connection with the *Sosa* action.

FIRST CAUSE OF ACTION

19. Indian Harbor repeats and realleges each of the foregoing paragraphs as if fully set forth hereat.

20. Without waiver of and while expressly preserving each of the provisions in the Indian Harbor insurance contract and the grounds set forth in its correspondence to 2420 Prospect, among other things, Indian Harbor is entitled to a declaration that there is no coverage obligation for the *Sosa* action under the Indian Harbor insurance contract or, in the alternative, an allocation between the uncovered and any covered claims, damages and/or parties, for each of the following reasons:

a. There is no coverage under the Indian Harbor insurance contract for the *Sosa* action on the ground that there has been breach of the conditions precedent to coverage, including the failure to provide timely written notice of occurrence, claim and suit, forward documents, and cooperate with respect to this matter. Here, Indian Harbor was not provided notice by the defendants until December 18, 2007. That constitutes gross late notice and bars coverage as a matter of law.

b. There is no coverage under the Indian Harbor insurance contract for the underlying *Sosa* action on the grounds and to the extent that there is no "bodily injury" caused by an "occurrence" within the meaning of the Indian Harbor insurance contract.

c. There is no coverage under the Indian Harbor insurance contract for the underlying *Sosa* action on the grounds that exclusion b of Coverage A applies to bar coverage.

d. There is no coverage under the Indian Harbor insurance contract for the underlying *Sosa* action on the grounds and to the extent that 2420 Prospect seeks any pre-tender costs or expenses or voluntary payments.

e. There is no coverage under the Indian Harbor insurance contract for the underlying *Sosa* action on the grounds and to the extent that any of the defendants or any other entity has, for any losses allegedly covered by the Indian Harbor insurance contracts, co-insurance, other insurance, self-insurance, deductibles, retentions, collateral sources of money, or other contractual indemnitors or to the extent the Indian Harbor insurance contracts provide limited or no insurance based on an allocation or to the extent that the Indian Harbor insurance contracts constitute excess insurance.

f. There is no coverage under the Indian Harbor insurance contract for the underlying *Sosa* action on the grounds and to the extent that any award exceeds the applicable limit of the Indian Harbor insurance contracts and/or to the extent that any deductible or retention applies to bar coverage.

21. Indian Harbor's cause of action and coverage position is based upon the facts which are available to Indian Harbor at this time. Indian Harbor reserves its right to raise any additional defenses and grounds for disclaiming coverage in the future should Indian Harbor determine that such additional defenses and grounds exist.

22. Based upon the foregoing, Indian Harbor is entitled to a judicial declaration that it has no obligation to defend or indemnify anyone with respect to any claims in or related to the *Sosa* action.

SECOND CAUSE OF ACTION

23. Indian Harbor repeats and realleges each of the foregoing paragraphs as if fully set forth hereat.

24. Indian Harbor has denied coverage to 2420 Prospect, but is providing a courtesy, interim defense to 2420 Prospect in the *Sosa* action, pending resolution of the coverage issues.

25. 2420 Prospect has been unjustly enriched by Indian Harbor providing a defense for the *Sosa* action.

26. Indian Harbor is entitled to reimbursement from 2420 Prospect for all past and future costs that have been or will be incurred by Indian Harbor in defending 2420 Prospect for uncovered claims in the *Sosa* action, plus interest, since Indian Harbor has no obligation under the Indian Harbor insurance contract to defend or indemnify 2420 Prospect with respect to the *Sosa* Action.

27. Indian Harbor is also entitled to reimbursement from 2420 Prospect for any indemnification that may be paid by Indian Harbor on behalf of 2420 Prospect in connection with the *Sosa* action, plus interest, since Indian Harbor has no obligation under the Indian Harbor insurance contract to defend or indemnify 2420 Prospect with respect to the *Sosa* Action.

28. Plaintiff is entitled to a money judgment against 2420 Prospect, on grounds of unjust enrichment, indemnity, contribution, and contract, reimbursing it for all past and future sums that have been or will be incurred by plaintiff in its defense of 2420 Prospect in the *Sosa* action, plus interest.

29. Further, plaintiff is also entitled to a money judgment against 2420 Prospect, on grounds of unjust enrichment, indemnity, contribution, and contract, reimbursing it for any and all sums that may be paid as indemnity by plaintiff on behalf of 2420 Prospect in connection with the *Sosa* action, plus interest.

30. For the foregoing reasons, Indian Harbor is also entitled to a money judgment awarding it any and all past and future attorneys' fees, costs, disbursements and any indemnity payments, plus interest, which have been or will be paid by Indian Harbor in connection with its defense of 2420 Prospect in the *Sosa* action.

36. Alternatively, Indian Harbor is entitled to an allocation and monetary judgment awarding it the uncovered sums, costs, fees, claims, damages and any indemnity expended on behalf of 2420 Prospect with respect to the *Sosa* action plus interest.

WHEREFORE, plaintiff Indian Harbor Insurance Company prays for judgment:

(i) With respect to the first cause of action, declaring that Indian Harbor owes no coverage obligation, including any obligation of defense or indemnity, for any claims related to or arising from the *Sosa* action.

(ii) With respect to the second cause of action, awarding Indian Harbor a money judgment in an amount to be determined at trial, reimbursing it for all uncovered sums, costs, fees, expenses and disbursements, plus interest, incurred in connection with the defense and any indemnity, plus interest on all of the foregoing.

(iii) Awarding Indian Harbor attorneys' fees, costs and disbursements incurred in this action; and

(iv) Awarding Indian Harbor such other and further relief as the Court may deem just and proper.

JURY DEMAND

Indian Harbor demands trial by jury of all issues so triable.

Dated: February 20, 2008

Respectfully submitted,

NIXON PEABODY LLP

By: ______________________

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